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ATTORNEY FOR APPELLEE:

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**IN THE
COURT OF APPEALS OF INDIANA**

[illegible]

No. 49A02-0804-JV-325

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn Moores, Judge
The Honorable Scott Stowers, Magistrate
Cause No. 49D09-0710-JC-043690

October 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Amanda Ryan (“Mother”) appeals the trial court’s determination that her daughter, S.T., is a Child in Need of Services (“CHINS”). On appeal, she argues that she was denied due process when the trial court proceeded with the CHINS matter without the appointment of a Guardian ad Litem (“GAL”) for S.T. and that the evidence is insufficient to support the trial court’s determination. Finding that Mother waived her due process argument and that the evidence is sufficient, we affirm.

Facts and Procedural History

Mother gave birth to S.T. on April 22, 1991. Kenneth Taylor is S.T.’s biological father.¹ When S.T. was three years old, she went to live with her paternal grandmother. S.T.’s grandmother had custody of her until June 2007, when the grandmother passed away. S.T. continued to live in her grandparents’ home until October 2007, when her grandfather decided that he was no longer willing to care for her. S.T. was then placed in foster care.

The Marion County Department of Child Services (“MCDCS”) filed a request for permission to file a CHINS petition, which the trial court granted, and subsequently filed a petition alleging that S.T. is a CHINS. Appellant’s App. p. 13-18, 23-24. In support of its petition, the MCDCS contended:

¹ Taylor is not a party to this appeal.

[N]either [S.T.'s] mother, Amanda Ryan, nor her father, Kenneth Taylor, are able to provide the child with adequate and necessary food, clothing, shelter, medical care, education, or supervision. The child had been living with a relative who lacked legal custody and is no longer able or willing to provide the child with care. The child has not lived with either parent for more than ten (10) years. At this time, Ms. Ryan has an open CHINS case involving the neglect of her younger children as well as criminal charges and Mr. Taylor is in a work release program after being released from a thirteen (13) year incarceration and neither is able to provide appropriate care for the child.

Id. at 17. Not long after the MCDCS filed the CHINS petition, S.T. ran away from her foster care placement, and her whereabouts remain unknown.

During the initial hearing on the CHINS petition, the trial court ordered that a GAL be appointed for S.T. *Tr.* p. 2. However, during a later pretrial hearing, the appointed GAL, Child Advocates, Inc., notified the court and parties orally that S.T. was waitlisted for GAL services. *Id.* at 24. Mother's counsel did not object to proceeding without a GAL. A month later, during the CHINS factfinding hearing, Child Advocates again orally notified the court and the parties that S.T. was waitlisted for GAL services. *Id.* at 27. Child Advocates also filed a written notice to the court that S.T. was waitlisted for GAL services for "an indeterminable period of time" because of the organization's caseload. Appellant's App. p. 69. This notice was served upon Mother's counsel. *Id.* at 70. Again, Mother's counsel did not object to continuing with the CHINS proceedings.

During the CHINS factfinding hearing, the parties stipulated to the facts surrounding S.T.'s departure from her grandparents' home and the circumstances leading up to her disappearance. After the hearing, the trial court issued an order declaring S.T.

to be a CHINS, incorporating into its order the facts to which the parties stipulated during the hearing and other materials submitted to the court. *Id.* at 10-11. Mother now appeals.

Discussion and Decision

Mother raises two issues on appeal: (1) whether the trial court erred in conducting the CHINS proceedings although no GAL had been assigned to the case and (2) whether the evidence is sufficient to support the trial court's determination that S.T. is a CHINS.

I. Assignment of a GAL

Mother contends that she was denied due process during the CHINS proceedings because no GAL was assigned to the case. "The Due Process Clause of the United States Constitution prohibits state action that deprives a person of life, liberty or property without a fair proceeding." *Lawson v. Marion County Office of Family & Children*, 835 N.E.2d 577, 579 (Ind. Ct. App. 2005). A fair proceeding requires "the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 580 (quoting *Thompson v. Clark County Div. of Family & Children*, 791 N.E.2d 792, 795 (Ind. Ct. App. 2003), *trans. denied*). Due process is "flexible and calls for such procedural protections as the particular situation demands." *Id.*

Mother contends that she was denied due process during the CHINS proceedings because the trial court failed to appoint a GAL for S.T. as required by statute. She correctly points to Indiana Code § 31-34-10-3(2) for the proposition that juvenile courts are required by statute to appoint a GAL or a court appointed special advocate (CASA) for children alleged to be in need of services pursuant to particular statutory provisions. Indiana Code § 31-34-10-3(2) provides:

Before complying with the other requirements of this chapter, the juvenile court shall first determine whether the following conditions make it appropriate to appoint a guardian ad litem or a court appointed special advocate, or both, for the child:

(2) If the child is alleged to be a child in need of services under:

- (A) IC 31-34-1-1;
- (B) IC 31-34-1-2;
- (C) IC 31-34-1-3;
- (D) IC 31-34-1-4;
- (E) IC 31-34-1-5;
- (F) IC 31-34-1-7; or
- (G) IC 31-34-1-8;

the court shall appoint a guardian ad litem, court appointed special advocate, or both, for the child.

Because S.T. is alleged to be a child in need of services under Indiana Code § 31-34-1-1, *see* Appellant's App. p. 17, the juvenile court was statutorily required to appoint a GAL or CASA for the purpose of her CHINS proceeding.

In compliance with Indiana Code § 31-34-10-3(2), the trial court ordered the appointment of a GAL during the initial hearing on the CHINS petition. Tr. p. 2; Appellant's App. p. 25. However, the appointed GAL, Child Advocates, filed a notice with the trial court on the day of the CHINS fact-finding hearing notifying the court and the parties that S.T. was on a waiting list for GAL services. Appellant's App. p. 69. The notice provides:

1. The Court appointed the Guardian ad Litem on October 15, 2007.
 2. Child Advocates, Inc.'s determination of best practices makes it necessary to reduce its Guardian ad Litem's caseload.
 3. Due to inadequate resources to fully staff this case, Child Advocates, Inc. finds it necessary to put [S.T.], under the above-captioned cause number on a waiting list for an indeterminable period of time.
- WHEREFORE, Child Advocates, Inc. respectfully notifies the Court that even though [S.T.] ha[s] been assigned a Guardian ad Litem through Child Advocates, Inc., [S.T.] will remain on our waiting list and the agency cannot staff this case until further notice to the Court.

Id. Not only did the GAL send a copy of this notice to all parties, a representative of the GAL was present in court during hearings on January 29, 2008, and February 20, 2008, and notified the court and parties during both hearings that S.T. was waitlisted for GAL services. Tr. p. 24, 27. Mother was not present during either hearing because she was incarcerated, but she was represented by counsel during both hearings. Mother's counsel did not object to proceeding without a GAL. *Id.*

Because Mother did not raise this issue before the trial court, she has waived the argument. *In re S.P.H.*, 806 N.E.2d 874, 877-78 (Ind. Ct. App. 2004). Despite the constitutional nature of her claim, it is well established that we may consider a party's constitutional claim waived when the party raises it for the first time on appeal. *Id.* at 877. Furthermore, we have held that where a party alleges a due process violation based upon a trial court's failure to comply with statutory provisions during a CHINS proceeding, where the party never objects during the proceeding, the issue is waived on appeal. *Id.* at 877-78.

Waiver notwithstanding, Mother does not allege a procedural deficiency that rises to the level of a constitutional violation. In order to reverse the trial court's judgment based upon fundamental error, we must determine that the "error was a 'clear blatant violation of basic and elementary principles, and the harm or potential harm must be substantial and appear clearly and prospectively.'" *In re A.L.H.*, 774 N.E.2d 896, 900 (Ind. Ct. App. 2002) (quoting *M.M. v. Elkhart Office of Family & Children*, 733 N.E.2d 6, 11 (Ind. Ct. App. 2000)). To determine whether there has been a due process violation, we balance the following three factors: (1) the private interests affected by the

proceeding; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing government interest supporting use of the challenged procedure. *A.P. v. Porter County Office of Family & Children*, 734 N.E.2d 1107, 1112 (Ind. Ct. App. 2000), *reh'g denied, trans. denied*.

Here, Mother challenges the trial court's decision to proceed with S.T.'s CHINS case without the assistance of a GAL. First, we examine the extent to which Mother's private interests were affected by this procedure. We have found in the past that a parent involved in a CHINS matter "may not claim prejudice caused by the trial court's refusal to appoint a GAL . . . during the CHINS proceedings." *In re A.L.H.*, 774 N.E.2d at 901. Next, we look to the risk of error created by the court's decision to proceed without a GAL. Here, had a GAL appeared to represent S.T.'s interests, the GAL would have been severely limited in his or her ability to present information to the court beyond what the court already knew about S.T.'s well-being and needs. This is so because S.T. was a runaway during the course of the proceedings, and her whereabouts are presently unknown. Finally, we examine the government's countervailing interest in moving forward with S.T.'s CHINS proceeding without the services of a GAL. As just noted, it is unlikely that a GAL could have provided any additional information about S.T.'s needs and interests to the court because S.T. is missing. Additionally, the government has a real interest in processing a CHINS petition instead of delaying the provision of or preparation for services to a child for an "indeterminable period of time." Appellant's App. p. 69. We conclude that the consideration of the necessary factors reflects that any

error committed by the trial court in this case relating to the use of a GAL's services does not rise to the level of a due process violation.

II. Sufficiency of the Evidence

Mother also argues that the MCDCS presented insufficient evidence to support the finding that S.T. is a CHINS. The MCDCS has the burden of proving by a preponderance of the evidence that a child is a CHINS. *See* Ind. Code § 31-34-12-3; *In re M.W.*, 869 N.E.2d 1267, 1270 (Ind. Ct. App. 2007). When determining whether sufficient evidence exists in support of a CHINS determination, we consider only the evidence favorable to the judgment and the reasonable inferences raised by that evidence. *In re M.W.*, 869 N.E.2d at 1270. This Court will not reweigh the evidence or judge witnesses' credibility. *Id.* Here, the trial court made specific findings and conclusions of law in its order adjudicating S.T. to be a CHINS. Appellant's App. p. 10-11. Where a trial court enters specific findings and conclusions thereon, we apply a two-tiered standard of review. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). First, we determine whether the evidence supports the findings, and second, we examine whether the findings support the judgment. *Id.* We will set aside the trial court's judgment only if it is clearly erroneous. *Id.*

The MCDCS alleged that S.T. is a CHINS pursuant to Indiana Code § 31-34-1-1. Indiana Code § 31-34-1-1 provides:

A child is a child in need of services if before the child becomes eighteen (18) years of age:

(1) the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision; and

- (2) the child needs care, treatment, or rehabilitation that:
 - (A) the child is not receiving; and
 - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

On appeal, Mother contends that the trial court had insufficient evidence that S.T. is a CHINS because “it was not known whether [S.T.’s] physical or mental health was seriously endangered.” Appellant’s Br. p. 10. Mother’s premise is that, because S.T. is a runaway and her current location and circumstances are unknown, the trial court lacked evidence that her physical or mental health is seriously endangered. We disagree.

Mother and the MCDACS stipulated to a number of facts in this case, and the trial court incorporated these stipulations of fact into its CHINS order. The evidence reflects that S.T. was born in 1991 and lived with her paternal grandmother from when she was three years old until her grandmother’s death in June 2007. Appellant’s App. p. 71. Approximately four months later, S.T.’s grandfather decided that he was no longer willing to care for her. *Id.* Sixteen-year-old S.T. was placed into foster care because Mother, who has been convicted of child neglect relating to other children, was incarcerated and could not care for her. *Id.* at 71-72. Further, S.T.’s father had just served a thirteen-year prison sentence and was in a work release program. *Id.* at 17. S.T. ran away from her foster care home on October 24, 2007, and her whereabouts remain unknown. *Id.* at 71-72. These facts reveal that S.T., a minor child, is without a legal guardian with whom she can live and who will provide her with the basic necessities of life. While we cannot know the details of her present life because she is missing, it is apparent that S.T.’s physical and mental health is seriously endangered because no one is legally responsible for both providing for her and ensuring her safety. Furthermore, even

if S.T. were located, no adult is presently both legally responsible and available to care for her. The evidence thus supports a finding that S.T.'s physical or mental health is seriously endangered. Likewise, the evidence supports a finding that S.T. is in need of care and treatment that will not be provided without the coercive intervention of the court.² It follows that because S.T. lacks a caretaker who is both legally responsible for her well-being and available to care for her, intervention by the court is necessary to establish a safe home for S.T.

The judgment of the trial court is affirmed.

KIRSCH, J., and CRONE, J., concur.

² Mother makes mention only once in her brief, and in only one sentence, that she challenges the sufficiency of the evidence to support this finding. Appellant's Br. p. 11. She makes no distinct argument that the evidence is insufficient to support a finding that S.T. is in need of care and treatment that are unlikely to be provided or accepted without the coercive intervention of the court.